IN THE MISSOURI SUPREME COURT

Case No. SC 84400

STATE OF MISSOURI, ex rel.
STEVE DOWDY AND KIERRA DOWDY, A MINOR,
BY AND THROUGH HER FATHER AND
NEXT FRIED, STEVE DOWDY,

Relators,

v.

THE HONORABLE MARGARET M. NEILL AND THE
HONORABLE BARBARA W. WALLACE,

Respondents.

BRIEF OF RESPONDENT

WILLIAM A. BRASHER #30155
Brasher Law Firm, L.C.
One Metropolitan Square
211 N. Broadway, Suite 2300
St. Louis, MO 63101
(314) 621-7700
(314) 621-1088 – Fax

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS **PAGE**

MISSOURI STATUTES **PAGE**

JURISDICTIONAL STATEMENT

This extraordinary writ proceeding involves: (1) the question of whether Respondent, the Honorable Margaret M. Neill, properly followed existing law by transferring Relators' lawsuit brought against an individual and a corporation by Amended Petition from the city of St. Louis, pursuant to RSMo. §476.410, even though Relators dismissed without prejudice, their claim against the individual prior to transfer, to a proper venue as determined by RSMo. §508.010; and (2) whether a Writ of Mandamus is a proper proceeding to change existing law. This Court has jurisdiction of this Writ proceeding under Article V, §4, of the Missouri Constitution.

STATEMENT OF FACTS

Respondent provides the following Statement of Facts for completeness and clarification.[1]

On August 23, 1999, Tammy J. Dowdy was fatally injured in a car/train accident at a railroad crossing in Rolla, Phelps County, Missouri, when she drove her car into the path of a train operated by the engineer, William A. Drapp, an employee of The Burlington Northern and Santa Fe Railway Company (hereinafter "BNSF"). At the time of the accident, Tammy Dowdy resided in Phelps County, Missouri with her husband Steve Dowdy and minor child, Kierra Dowdy, who was a passenger and injured in the collision.

On November 22, 1999, Steve Dowdy and Kierra Dowdy (Relators herein), filed suit against BNSF as the sole Defendant in the Circuit Court of the City of St. Louis, Missouri. BNSF is a common carrier by rail, incorporated in Delaware, which owns a line of railroad where the accident occurred. Additionally, BNSF owns and operates a line of railroad in the city of St. Louis and numerous counties in Missouri including St. Louis County where it transacts business and where it was served with the summons and Petition on December 8, 1999, at the office of its agent for service of process, established pursuant to V.A.M.S. §351.586 RSMo.

[1] Respondent believes that the facts stated herein are not in dispute.

On November 29, 1999, six days after filing their initial suit and prior to service of the suit on BNSF, Relators abandoned their original Petition by filing a First Amended Petition initiating suit against William A. Drapp and BNSF in the Circuit Court of the city of St. Louis. The Amended Petition was served on BNSF in St. Louis County, Missouri by summons issued on December 7, 1999. Mr. Drapp was served at his residence in Franklin County, Missouri on January 14, 2000.

Given the fact that Relators' cause of action did not arise in the city of St. Louis, and neither Mr. Drapp nor BNSF resided in the city of St. Louis, pursuant to a long and consistent line of decisions interpreting V.A.M.S. §508.010 RSMo. which is applicable when individuals are joined with a corporation or corporations as defendants, Mr. Drapp and BNSF timely moved for a transfer of venue pursuant to V.A.M.S. §476.410 RSMo. to a proper venue under V.A.M.S. §508.010 RSMo.

On September 6, 2000, the Honorable Michael B. Calvin denied Defendants' Motion to Transfer Venue. On October 23, 2001, this Court issued its opinion in State ex. rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001). On November 2, 2001, Plaintiffs dismissed, without prejudice, Mr. Drapp, as a Defendant. On November 12, 2001, Defendant BNSF filed its Memorandum renewing its Amended Motion to Transfer Venue. On December 6, 2001, BNSF removed this case to the United States District Court for the Eastern District of Missouri. On January 18,

2002, the Honorable Steven N. Limbaugh remanded this case to the Circuit Court of the city of St. Louis.

Following remand and a hearing on Defendant's Motion to Transfer, the Honorable Margaret M. Neill granted the Motion to Transfer Venue on March 18, 2002 and transferred venue to the Circuit Court of St. Louis County. On March 26, 2002, Relators sought a Writ of Prohibition and Writ of Mandamus in the Missouri Court of Appeals, Eastern District, which was denied on April 11, 2002. On April 16, 2002, Relators filed their Petition for Writ of Prohibition and Writ of Mandamus in the Supreme Court of Missouri. On May 28, 2002 this Court granted its Alternative Writ of Mandamus.

POINTS RELIED ON

POINT I

RELATORS ARE NOT ENTITLED TO A PERMANENT ORDER OF MANDAMUS VACATING RESPONDENT'S ORDER TRANSFERRING THIS CASE TO ST. LOUIS COUNTY AS RELATORS ACKNOWLEDGE THAT THIS COURT'S PRIOR DECISIONS INTERPRETING MISSOURI'S VENUE STATUTES SUPPORT THE PROPRIETY OF THE ORDER OF TRANSFER.

RSMo. §508.010(2)

RSMo. §508.040

State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951)

A. A WRIT OF MANDAMUS IS NOT A PROPER PROCEEDING FOR CHANGING EXISTING LAW.

State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446 (Mo. banc 1997)

State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786, 788 (Mo. banc 1999)

McDonald v. City of Brentwood, 66 S.W.3d 46, 50 (Mo.App.E.D. 2001)

State ex rel. Mason v. County Legislature, 75 S.W.3d 884

(Mo.App.W.D. 2002)

B. RELATORS' ARGUMENT THAT PRIOR DECISIONS OF THIS COURT HAVE MISINTERPRETED THE INTENT OF THE GENERAL ASSEMBLY CANNOT OVERCOME THE CARDINAL RULE THAT ONCE THIS COURT HAS INTERPRETED A STATUTE, THE COURT'S CONSTRUCTION OF THE STATUTE, INCLUDING ITS CONSTRUCTION OF LEGISLATIVE INTENT, BECOMES PART OF THE STATUTE AS IF IT HAD BEEN AMENDED BY THE GENERAL ASSEMBLY.

RSMo. §351.375

RSMo. §508.010

RSMo. §508.040

Dow Chemical v. Director of Revenue, 834 S.W.2d 742, 745 (Mo. banc 1992)

State v. Crawford, 478 S.W.2d 314, 317 (Mo. 1972)

Cramp v. Board of Public Instruction, 368 U.S. 278, 285, 82 S.Ct. 275, 280, 7 L.E.d.2d 285 (1961)

State ex inf. Gentry v. Meeker, 296 S.W. 411 (Mo. banc 1927)

C. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON PRIOR DECISIONS OF THIS COURT, LEGISLATIVE INTENT, AND PUBLIC POLICY.

Mo. Const. Art. IV, §1 1945

RSMo. 351.375

RSMo. §508.010

RSMo. §508.040

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991)

State ex rel. Quest Communications v. Baldridge, 913 S.W.2d 366, 369 (Mo.App.E.D. 1996)

State ex rel. Smith v. Gray, 979 S.W.2d 190, 194 (Mo. banc 1998)

State ex rel. Webb v. Satz, 561 S.W.2d 113, 114 (Mo. banc 1978)

D. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON THE RULE OF *STARE DECISIS*.

RSMo. §508.010

RSMo. §508.040

Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. banc 1998)

State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951)

M & H Enterprises v. Tri-State Delta Chemicals, Inc., 984 S.W.2d 175, 178 (Mo.App.S.D. 1998)

U.S. Life Title Insurance Co. v. Brents, 676 S.W.2d 839, 841 (Mo.App.W.D. 1984)

POINT II

RELATORS ARE NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE THE ORDER OF TRANSFER BECAUSE VENUE IS NOT PROPER IN THE CITY OF ST. LOUIS PURSUANT TO §508.010(2) AS BNSF IS NOT A RESIDENT OF THE CITY.

A. UNDER §508.010, BNSF RESIDES IN ST. LOUIS COUNTY, NOT THE CITY OF ST. LOUIS AS ARGUED BY RELATOR.

RSMo. §351.015

RSMo. §351.375(2)

RSMo. §351.582

RSMo. §351.690

RSMo. §508.010

RSMo. §508.040

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991)

State ex rel. Whiteman v. James, 265 S.W.2d 298 (Mo. banc 1954)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962)

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998)

B. AS A FOREIGN RAILROAD CORPORATION, BNSF WOULD NONETHELESS BE ENTITLED TO THE SAME BENEFITS AFFORDED TO A DOMESTIC CORPORATION EVEN IF THERE WAS ANY MERIT TO RELATORS' ARGUMENT THAT FOREIGN CORPORATIONS SHOULD BE TREATED DISPARATELY FROM DOMESTIC CORPORATIONS.

Mo. Const. Art. IV, §1 1945

RSMo. §388.290

POINT III

STATE EX REL. LINTHICUM V. CALVIN IS CONSISTENT WITH PUBLIC POLICY AND LEGISLATIVE INTENT AND SHOULD NOT BE OVERTURNED.

RSMo. §508.010

RSMo. §508.040

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994)

Bailey v. Innovative Mgmt. & Inv. Inc., 890 S.W.2d 648, 650-51 (Mo. banc 1995)

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 342 (Mo. banc 1988)

A. STATE EX REL. LINTHICUM V. CALVIN HAS NOT CREATED "CHAOS" NOR HAS IT CREATED MORE PROBLEMS THAN IT HAS SOLVED NOR DOES IT PREVENT A SUIT AGAINST A CORPORATION WITHOUT ITS ACQUIESCENCE.

RSMo. 476.410

RSMo. §508.010

RSMo. §508.040

State ex rel. Vaughn v. Koehr, 835 S.W.2d 543, 544 (Mo.App.E.D. 1992)

State ex rel. Mellenbrunch v. Mummert, 821 S.W.2d 108, 109 (Mo.App.E.D. 1991)

Hefner v. Dausmann, 996 S.W.2d 660, 663 (Mo.App.S.D. 1999)

State ex rel. England v. Koehr, 849 S.W.2d 168, 169 (Mo.App.E.D. 1993)

POINT IV

RELATORS CANNOT DISTINGUISH THE FACTS IN THIS CASE WITH THE FACTS IN STATE EX REL. DEPAUL HEALTH CENTER V. MUMMERT OR STATE EX REL. LINTHICUM V. CALVIN AND THE DISMISSAL OF WILLIAM A. DRAPP DOES NOT INVALIDATE RESPONDENT'S ORDER.

RSMo. §355.176.4

RSMo. §508.010

RSMo. §508.040

State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994

Evans v. Eno, 903 S.W.2d 258, 260 (Mo.App.W.D. 1995)

Leis v. Massachusetts Bonding & Ins. Co., 125 S.W.2d 906, 908 (Mo. App. 1939)

Weir v. Brune, 256 S.W.2d 810, 811 (Mo. 1953)

POINT V

A DETERMINATION THAT FOREIGN CORPORATIONS RESIDE WHERE THEY MAINTAIN THEIR REGISTERED AGENT AND IN ANY COUNTY WHERE THEY HAVE OFFICES OR AGENTS FOR THE TRANSACTION OF BUSINESS WILL SUBSTANTIALLY INCREASE THE NUMBER OF LAWSUITS FILED IN THE CITY OF ST. LOUIS OR OTHER PREFERRED PLAINTIFFS' VENUES, TO THE DETRIMENT OF INDIVIDUALS, OTHER DISTRICT COURTS, OTHER COUNTIES, AND TO THE DETRIMENT OF RESIDENTS OF THE CITY OF ST. LOUIS.

RSMo. §508.010

INTRODUCTION

A. THE ISSUES

In this proceeding, Relators,[2] citing Alice in Wonderland and relying on quotes by Nietzsche and Tweedledee, implore the Court to overrule half a century of prior venue decisions and go down the road which will open the floodgates that have heretofore precluded plaintiffs from subjecting individuals to suit in any location, particularly the city of St. Louis, where venue is proper as to a corporation under RSMo. §508.040. **The issues are simple. (1) Should this Court abolish by judicial fiat the long-held precedent and policy of the state of Missouri to treat individual defendants differently than corporate defendants by application of RSMo. §508.010 for venue purposes when an individual is sued along with a corporation? (2) Should this Court permit Relators, and others like them, to evade this policy by overruling State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 860-861 (Mo. banc 2001), to do indirectly, what they cannot do directly, in contravention of legislative intent and the rule of *stare decisis*?**

[2] It is not surprising that Relators cite Alice in Wonderland, and rely on Nietzsche, and Tweeledee, since they have no binding precedent to cite in support of their position.

B. SUMMARY OF ARGUMENT

The General Assembly has enacted two venue statutes pertinent to this case, one for suits against corporations, RSMo. §508.040, and one for suits against non-corporate defendants, including individuals, RSMo. §508.010.

For over half a century this Court has repeatedly and consistently held that RSMo. §508.040 is applicable if suit is initiated solely against one or more corporations but if an individual is joined with a corporation as a defendant, RSMo. §508.010 is applicable. It is obvious and indisputable that the General Assembly intended to treat corporations different than individual defendants and, in fact, expanded the number of venues that corporate defendants could be sued in, as contrasted to the number of venues that individual defendants could be sued in.

Corporate defendants can be sued in any venue where the cause of action accrued, or in any venue where the corporation has an office or agent for the transaction of their usual and customary business, RSMo. §508.040. In the case of railroad corporations, venue is proper in any county where the corporation owns, operates, or controls a line of railroad. Id. Individual defendants however, can only be sued in the venue where the cause of action accrued, RSMo. §508.010(6), in the county where any defendant resides, or in the county where the plaintiff resides and the defendant may be found, RSMo. §508.010(1).

To prevent the corporate venue statute from subjecting individual defendants to suit in the multiple venues that corporations were subject to suit under RSMo. §508.040 when an individual is sued with a corporation, this Court, consistent with legislative intent, has since 1951 consistently and repeatedly held that in this situation, RSMo. §508.010 is applicable to the exclusion of RSMo. §508.040. In order to prevent RSMo. §508.040 from swallowing RSMo. §508.010, this Court has previously held that for the purpose of determining the residence of a corporation under §508.010, the residence of a corporation is where it maintains its registered office or agent.

These decisions are straight-forward and consistent with legislative intent. Having not repudiated this Court's interpretation and construction of these venue statutes, the General Assembly has in essence, confirmed these decisions as reflective of legislative intent. **That is, for venue purposes, it is the policy of the state of Missouri to restrict venue when individual defendants are sued to those limited locations set forth in RSMo. §508.010, even when they are joined in a suit with a corporation.**

However, in an effort to maintain venue in the city of St. Louis, Relators followed the scheme devised and utilized by others prior to this Court's decision in Linthicum and sued the corporation only initially, although intending all along to join the locomotive engineer, William A. Drapp, in order to prevent removal to

federal court. Then, prior to service and/or answer by the corporation, Relators abandoned their initial petition and filed suit against Mr. Drapp and BNSF via amended petition and claimed that since suit was originally brought only against BNSF, Mr. Drapp has no venue rights under RSMo. §508.040 and can be dragged to any location where venue is proper against BNSF. This scheme was properly rejected in Linthicum less than a year ago.

Following this Court's decision in Linthicum, Relators quickly dismissed Mr. Drapp from their amended petition in an effort to avoid the application of RSMo. §508.010 and transfer of this case to a proper venue. By doing so, Realtors hoped that the dismissal would somehow reactivate their abandoned initial petition to keep venue in the city of St. Louis despite the decision in State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994).

Arguing that prior decisions spanning half a century were "flawed", Relators now implore this Court to ignore the rule of *stare decisis*, legislative intent, statutory rules of construction, and overrule half a century of existing law, beginning with State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951) up to last year's Linthicum decision. They urge this Court to abandon 50 years of precedent to permit them, and similar plaintiffs, the right to sue individuals like Mr. Drapp in any location where venue is proper when a corporation is sued alone under RSMo. §504.040 which is clearly in contravention of Missouri's policy to

treat individuals differently for venue purposes than corporations. **Recognizing that fifty years of prior precedent precludes the position they now advocate, Relators "urge the Court to reconsider [its] flawed decisions on venue . . ." Relators' Brief p. 28.**

However, throughout this period of time, the General Assembly has not modified either venue statute following this Court's decisions from O'Keefe, in 1951 to Linthicum in 2001 to comport with Relators' current position and it must be presumed that the prior "flawed decisions" on venue properly reflect legislative intent. The construction of a statute by a court of last resort becomes a part of the statute "as if it has been so amended by the legislature." State v. Crawford, 478 S.W.2d 314, 317 (Mo. 1972) citing Cramp v. Board of Public Instruction, 368 U.S. 278, 285 (1961). If the rule of *stare decisis* means anything in our judicial system, it means that prior holdings of this Court are binding precedent which should not be overturned simply because Relators argue that prior court decisions were "flawed."

Nonetheless, Relators argue that this Court's decision in Linthicum is a "failed experiment" that has "created more problems than it solved," that "chaos . . . erupted after Linthicum," and that with Linthicum, "certainty and order were replaced with disorder, including the possibility of venue transfer at any point in the litigation." There is no basis for these gross exaggerations.

Contrary to Relators' hyperbole, Linthicum created a bright line rule preserving the venue rights of subsequently added parties and precluded the manipulation of subsequent joinder of parties to create venue where it would not be proper if all parties were joined initially, consistent with legislative intent. The Linthicum opinion, which Relators soundly criticize, simply holds that:

> For purposes of section 508.010, a suit instituted by summons is "brought" whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. This interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010(3). State ex rel. DePaul Health Center v. Mummert does not hold to the contrary and still applies whenever a defendant is dismissed from a lawsuit rather than added to it.

Linthicum at 858, fn omitted.

No "chaos" has been created by Linthicum nor has it "created more problems than it solved." In fact, the only "problem" it created was that it precluded Relators, and others like them, from filing their case in the city of St. Louis. Of course, as demonstrated by the facts in this case, the real goal of Relators is to establish venue in the city of St. Louis in **every** case possible, a venue

obviously perceived as the most lucrative in the state for plaintiffs. Because of its reputation, the city of St. Louis already has more than its fair share of litigation. **Opening the floodgates to more litigation will likely place "the right to jury trial at risk" and do little to "ease the tremendously disproportionate burden carried by the citizens of St. Louis city who are called to jury service."** State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 860-861 (Mo. banc 2001).[3]

However, by counting the number of concurring and dissenting opinions and noting the number of judges who have been replaced on the Court since Linthicum, Relators re-argue the propriety of the Linthicum decision in the hope of causing the current Court to adopt a position fully briefed, argued and rejected less than one year ago.[4] Relators even suggest that the decision has little precedential value because it ". . . fully expresses and conforms to the views of at most, two judges . . .", an odd pronouncement to say the least since there were clearly only three judges who dissented, or concurred in part and dissented in part. This vote counting re-argument is so repugnant to the rule of law and *stare decisis* that it

[3] Judge Wolff concurring in part and dissenting in part.

[4] Prior to Linthicum, this Court heard several other cases involving the same issues which were fully briefed and argued but did not render a decision on the merits.

undermines the entire judicial system. Once a decision is made by this Court it becomes the law, irrespective of dissenting opinions.

While several members of the current Court obviously disagreed with the majority opinion in Linthicum, the rule of *stare decisis* and the rule of law mandates it **is** the law. **Additionally, when a statute has been interpreted by this Court, and the General Assembly does not repudiate the interpretation, the General Assembly is deemed to have adopted the construction.** State ex rel. Smith v. Atterbury, 270 S.W.2d 399, 403-404 (Mo. banc 1954); Duckworth v. U.S. Fidelity & Guaranty Co., 452 S.W.2d 280, 286 (Mo. App. 1970). The rule of law does not permit a re-determination of the Court's decision every time the composition of the Court changes irrespective of *stare decisis*. Relators' blatant attempt to repudiate the underpinnings of our judicial system must be rejected.

If Relators believe the road taken by the Linthicum Court was wrong, the proper forum for relief is the General Assembly. If this Court's decision in Linthicum, or any other prior decision interpreting RSMo. §§508.010 or 508.040 about which Relators now complain, did not reflect legislative intent, the General Assembly would no doubt have corrected this Court's "flawed" analysis of its intent. It has not done so. This Court got it right in O'Keefe and the innumerable decisions following O'Keefe, as well as Linthicum, which limits venue to those

locations set forth in RSMo. §508.010 when individuals are joined with a corporation as a defendant, as reflective of legislative intent.

ARGUMENT

I. RELATORS ARE NOT ENTITLED TO A PERMANENT ORDER OF MANDAMUS VACATING RESPONDENT'S ORDER TRANSFERRING THIS CASE TO ST. LOUIS COUNTY AS RELATORS ACKNOWLEDGE THAT THIS COURT'S PRIOR DECISIONS INTERPRETING MISSOURI'S VENUE STATUTES SUPPORT THE PROPRIETY OF THE ORDER OF TRANSFER.

In Point I, Relators argue that this Court should vacate Respondent's Order of Transfer because every court which has interpreted the General Assembly's venue statutes pertinent to this case beginning with the 1951 decision in State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), has "misunderstood," "misapplied," or "misinterpreted legislative intent" and thus, this Court should overrule half a century of precedent and subject individuals in Missouri to suit in any location where venue is proper as to a corporate defendant.

While it is surprising, to say the least, that so many of Missouri's Supreme Court Judges over the last half-century have "completely misapplied" Missouri's venue law, failed to recognize that its opinions were "deeply flawed," or demonstrated a "lack of regard . . . to clear legislative intent," **Relators correctly**

recognize the "long line of Missouri cases" which hold that:

> **§508.040 is applicable only when a corporation is a sole defendant or when one or more corporations are sued; but when one or more corporations are sued with an individual, venue is determined by §508.010(2); and in that situation, the "residence" of the corporate defendants is in the county where its registered agent is located.** (Citations omitted.) Relators' Brief p. 32.

It is this long line of authority which Relators seek to overturn through this writ proceeding in order to pursue this case in the city of St. Louis, a venue that is not proper under existing law.

A. A WRIT OF MANDAMUS IS NOT A PROPER PROCEEDING FOR CHANGING EXISTING LAW.

Before proceeding to the merits of Relators' argument however, it must be noted that a Writ of Mandamus is not an appropriate proceeding to overrule existing law. The purpose of mandamus is to execute and not to adjudicate. State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446 (Mo. banc 1997). Mandamus is only appropriate when the right to be enforced is clear, unequivocal, specific, and only then to require the performance of a ministerial act. State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786, 788 (Mo. banc

1999). One seeking mandamus must allege and prove a clear and specific right to the thing claimed. McDonald v. City of Brentwood, 66 S.W.3d 46, 50 (Mo.App.E.D. 2001). Mandamus is a discretionary writ and no right exists to have the writ issued. State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786, 788 (Mo. banc 1999); State ex rel. Mason v. County Legislature, 75 S.W.3d 884 (Mo.App.W.D. 2002). Mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. State ex rel. Miracle Recreation Equipment Co. v. O'Malley, 62 S.W.3d 407 (Mo. banc 2001, Judge White dissenting). In this case, the law is clear. Based on prior decisions of this Court, venue is not proper in the city of St. Louis. **Relators' admitted attempt to judicially change Missouri's long-established venue law by imploring this Court to overrule a half century of precedent is an inappropriate function of a Writ of Mandamus and instead, any change in Missouri venue law should be made by the General Assembly.** For this reason alone, this Writ should be quashed.

B. RELATORS' ARGUMENT THAT PRIOR DECISIONS OF THIS COURT HAVE MISINTERPRETED THE INTET OF THE GENERAL ASSEMBLY CANNOT OVERCOME THE CARDINAL RULE THAT ONCE THIS COURT HAS

INTERPRETED A STATUTE, THE COURT'S CONSTRUCTION OF THE STATUTE, INCLUDING ITS CONSTRUCTION OF LEGISLATIVE INTENT, BECOMES PART OF THE STATUTE AS IF IT HAD BEEN AMENDED BY THE GENERAL ASSEMBLY.

Relators expend all of Point I trying to re-argue Missouri's prior venue decisions which are adverse to their position. Throughout, Relators argue that every predecessor court which has addressed Missouri's venue law applicable to this case got it wrong and "the line of cases starting with O'Keefe . . . ignores the intent of statutes such as §508.040 . . . and does indeed 'blaspheme the whole' of Missouri's venue law." Relators' Brief p. 50.

Relators ignore however, that once this Court interprets a statute, its interpretation and construction of the law becomes a part of the statute as if it had been so amended by the General Assembly. As noted by this Court in Dow Chemical v. Director of Revenue, 834 S.W.2d 742, 745 (Mo. banc 1992):

> **It is not only the text of a statute that makes the legislative intent known, however, but also the judicial decisions that construe and give effect to the statute. State v. Crawford, 478 S.W.2d 314, 317 (Mo. 1972). The construction of a statute by a court of last resort becomes a part of the statute "as if it had been so amended by the**

legislature." *Citing* Cramp v. Board of Public Instruction, 368 U.S. 278, 285, 82 S.Ct. 275, 280, 7 L.E.d.2d 285 (1961).

Since this Court's 1951 opinion in State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), neither §508.040 or §508.010 have been modified by the General Assembly to subject individuals to suit in any venue where a corporation may be subject to suit under §508.040. Additionally, with full knowledge of this Court's decision interpreting §351.375, the statute defining a corporation's residence, and its interplay with the venue statutes, the General Assembly has not enacted any legislation disapproving of those prior decisions. **Where the General Assembly, after a statute has received judicial construction by a court of last resort, reenacts it, carries it over without change, or reincorporates exact language theretofore construed, it must be presumed that the General Assembly knew of and adopted such construction.** State ex inf. Gentry v. Meeker, 296 S.W. 411 (Mo. banc 1927); State ex rel. Smith v. Atterbury, 270 S.W.2d 399, 403-404 (Mo. banc 1954); King v. Laclede Gas Co., 648 S.W.2d 113 (Mo. Banc 1983). See also Duckworth v. U.S. Fidelity & Guaranty Co., 452 S.W.2d 280, 286 (Mo.App.E.D. 1970) which states that:

> A familiar rule requires that where the legislature, after a statute has received a settled judicial construction by the courts of last resort, re-enacts it, or carries it over without change, or re-incorporates the exact

language theretofore construed, it will be presumed that the legislature knew of and adopted this construction.

Had the Court misinterpreted the intent of the legislature in O'Keefe in 1951 or in any other case following O'Keefe, including Linthicum in 2001, it can be presumed that the General Assembly would have corrected this mistake. Any change in interpretation of the law that has been intact for half a century is the function of the General Assembly, not the Court's. The lack of action by the General Assembly is irrefutable evidence that the Court has correctly interpreted the intent of the venue statutes. The General Assembly has accepted this Court's prior interpretation of the interplay between §508.010, §508.040, and §351.375 as reflecting the intent of the venue statutes. **"Those who disagree with the statute or this Court's precedent analyzing the statute are free to seek redress in the legislative arena."** Crabtree v. Bugby, 967 S.W.2d 66, 77 (Mo. banc 1998); Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105, 110 (Mo. banc 1989).

C. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON PRIOR DECISIONS OF THIS COURT, LEGISLATIVE INTENT, AND PUBLIC POLICY.

In Missouri, the determination of where individuals and corporations may be sued is made by the General Assembly, the legislative branch of government. Article IV, §1 1945 Constitution. State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991). State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

The General Assembly has mandated those venues where suit is proper against individuals and corporations. *See* §§508.010, 508.040. Of significance is the fact that the General Assembly enacted two distinct venue statutes: §508.010, which applies when individual defendants are sued, and §508.040, which applies to corporate defendants only. It is evident that by enacting two separate statutes, the General Assembly intended for a distinction to be made between corporate defendants and individual defendants when determining proper venue. The General Assembly went to great measures to insure that individuals are subject to suit in a limited number of venues. §508.010; State ex rel. Quest Communications v. Baldridge, 913 S.W.2d 366, 369 (Mo.App.E.D. 1996).

The intended protection of individual defendants subsists in the residency requirements of the general venue statute. §508.010. Pursuant to §351.375, the General Assembly has determined that when §508.010 is applicable, a corporation resides in the county where its registered office and agent are located. State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991). In sharp contrast, the General Assembly did not extend residency limitations on venue in the corporate venue statute. The corporate venue statute of §508.040 is silent as to the matter of residency, leaving corporations broadly subject to lawsuits in any venue across the state of Missouri where it transacts business. State ex rel. Smith v. Gray, 979 S.W.2d 190, 194 (Mo. banc 1998) (concurring opinion); State ex rel. Webb v. Satz, 561 S.W.2d 113, 114 (Mo. banc 1978). **For over half a century, since State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), §508.040, §508.010, and §351.375 have been harmoniously and consistently interpreted by this Court.**

It is well settled that RSMo. §508.010 governs in suits filed against both corporate and individual defendants. State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996); State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc. 1994); State ex rel. Dick Proctor Imports, Inc. v. Gaertner, 671 S.W.2d 273, 274 (Mo. banc 1984); State ex rel. Hails v. Lasky, 546 S.W.2d 512, 515 (Mo.App.E.D. 1977).

Allowing an individual defendant to be subject to suit in every venue where corporations are subject to suit, as advocated by Relators, negates the intent of the legislature and frustrates the public policy behind the venue statutes. When the General Assembly declares the public policy of this state, courts are bound to follow that policy. State ex rel. Reser v. Rush, 562 S.W.2d 365, 369 (Mo. banc 1978); State ex inf. Dalton v. Miles Laboratories, 282 S.W.2d 564, 574 (Mo. banc 1955).

Subjecting individuals to venue as determined by §508.040 ignores the fundamental and inherently different characteristics of corporations and individuals that mandate disparate treatment between individual and corporate defendants. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 349 (Mo. banc. 1962); Julian v. Kansas City Star Co., 107 S.W. 496 at 499 (Mo. 1907).

The General Assembly has established a two-tiered venue system under §508.010 and §508.040 for the purpose of protecting individual Missouri citizens from being subject to suit in an unlimited number of jurisdictions. **By enacting §508.010, the General Assembly has established a limited number of venues that are statutorily mandated as convenient, logical, and orderly forums for suit against individuals.** Surely the General Assembly did not intend that individual venue rights could be abrogated by joining the individual in the suit via amended petition pursuant to a procedural rule of court. State ex rel. Turnbough v. Gaertner,

589 S.W.2d 290 (Mo. banc 1979). Kendall v. Sears Roebuck and Co., 634 S.W.2d 176, 179-80 (Mo. banc 1982).

To subject individuals to lawsuits in venues that are inconvenient and illogical, **as heretofore mandated by the General Assembly**, would violate the policy behind §508.010. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

Plaintiffs cannot be allowed to utilize the corporate venue statute as a means to extend the venue of a civil action against an individual defendant. State ex rel. Merritt v. Mummert, 863 S.W.2d 380, 382 (Mo.App.E.D. 1993). The corporate venue statute was not designed to maximize forum shopping. State ex rel. Gannon v. Gaertner, 592 S.W.2d 214 (Mo.App.E.D. 1979). In Gannon, the plaintiffs engaged in "forum shopping" by filing an action for damages in the city of St. Louis while the facts of the case had no connection to such venue. Id. The court in Gannon noted that the purpose of providing a convenient, logical, and orderly forum for litigation would be thwarted if plaintiffs were permitted to create venue merely by selecting a particular defendant ad litem. Id. at 216.

The multiple filings employed by Relators, pursuant to Missouri's procedural rule regarding amendment of pleadings, in an attempt to secure their venue of choice, contradicts the general reasoning in State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994), which clearly provides that plaintiffs are not to be permitted to indirectly create venue where it would not otherwise be proper. It is

against public policy, and half a century of prior precedent, to radically change Missouri's venue laws simply because Relators argue that prior Courts' interpretation of the venue statutes were "flawed."

D. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON THE RULE OF *STARE DECISIS*.

It is well settled that the "Supreme Court should not lightly disturb its own precedent, and mere disagreement by the current court with the statutory analysis of a predecessor court is not a satisfactory basis for violating the doctrine of *stare decisis*, at least in the absence of a recurring injustice or absurd results." Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. banc 1998).

Relators are asking this Court to overrule half a century of precedent beginning with State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), and hold that when individuals are joined with a corporation as a defendant, they are subject to suit in every venue where the corporation is subject to suit pursuant to §508.040. This change will subject individuals such as Mr. Drapp, to suit in virtually every one of Missouri's one hundred twelve (112) counties, and the city of St. Louis, when sued along with a major corporation, instead of the three (3) venues that are proper under §508.010. Under RSMo. §508.040 Mr. Drapp would be subject to suit in any one of the fifty (50) counties that BNSF operates its line of railroad, instead of the three (3)

counties where suit is proper under RSMo. §508.010 in contravention of existing law and the intent of the legislature to treat individuals differently, for venue purposes, than corporations.

It is undisputed that the doctrine of *stare decisis* is essential to provide a clear, consistent, and fair application of the law. *Stare decisis* is the cornerstone of our legal system. M&H Enterprises v. Tri-State Delta Chemicals, Inc., 984 S.W.2d 175, 178 (Mo.App.S.D. 1998) (fn 3). To prevent arbitrary and unpredictable decisions, courts are faced with the duty to follow past precedent to provide the legal system with the consistency that it needs to survive. For these reasons, this Court must decide this matter in accordance with the O'Keefe and Linthicum decisions - cases that this fact pattern mirrors. As noted in U.S. Life Title Insurance Co. v. Brents, 676 S.W.2d 839, 841 (Mo.App.W.D. 1984), "where the same or an analogous issue was decided in a prior case, the prior case stands as authoritative precedent, by doctrine of *stare decisis.*"

The doctrine of *stare decisis* takes on even more significance when the prior precedent involves the court's interpretation of a statute. As noted in Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989):

> **Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of**

constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

The General Assembly, having had every opportunity to correct the court's "flawed analysis" of O'Keefe and its progeny including Linthicum, has chosen not to repudiate the court's interpretation of statutory intent. When faced with the same type of argument that Relators assert in this case, the U.S. Supreme Court in Hilton v. South Carolina Public Railways Com'n, 502 U.S. 197 (1991) stated:

> Congress has had almost 30 years in which it could have corrected our decision in Parden if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added forced when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. That is so in the case before us.

"**Adherence to precedent ensures that like cases will be treated alike, and that similarly situated individuals are subject to the same legal consequences. In**

Justice [William O.] Douglas's words, 'there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.'"[5]

To be true to the doctrine of *stare decisis* this Court must continue to hold that §508.010 applies to individual and corporate co-defendants, as it has held so many times before. State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc. 1996); Sate ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994); State ex rel. Turnbough v. Gaertner, 589 S.W.2d 290, 291 (Mo. banc. 1979); State ex rel. Dick Procter v. Gaertner, 671 S.W.2d 273, 274 (Mo. banc. 1984).

The suggestion that the Court in O'Keefe "misinterpreted" the General Assembly's intent, and/or that subsequent decisions "blindly followed" O'Keefe without any analysis is merely Relators' rationalization and not a sufficient basis for radically changing Missouri's long-standing venue law. Even the Linthicum decision, protects the venue rights of individuals consistent with legislative intent, while not half a century old, is binding precedent which should not be disturbed.

A decision denying Defendant's Motion to Transfer would virtually abolish the venue rights of individuals sued together with corporations. This outcome is in contravention of over a half century of established law. Such an

[5] Renquist, The Power That Shall Be Vested In A Precedent: *Stare Decisis*, The Constitution And The Supreme Court, 66 Boston L.R. 345 (1986).

order would engraft the corporate venue statute, §508.040, on individuals thereby replacing the general venue statute, and thus permit plaintiffs to do indirectly what could not be done directly. This result is in discord with the intent of the General Assembly and the doctrine of *stare decisis.* State ex rel. Whiteman v. James, 265 S.W.2d 298, 300 (Mo. banc 1954).

II. RELATORS ARE NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE THE ORDER OF TRANSFER BECAUSE VENUE IS NOT PROPER IN THE CITY OF ST. LOUIS PURSUANT TO §508.010(2) AS BNSF IS NOT A RESIDENT OF THE CITY.

In Point II, Relators assert that even if §508.010 applies, as it clearly must for the reasons set forth above, this case should still not have been transferred from the city of St. Louis to St. Louis County because BNSF "resides" in the city of St. Louis. Section 508.010 reads, in pertinent part: "Suits instituted by summons shall, except as otherwise provided by law, be brought: (2) when there are several defendants, and they reside in different counties, the suit may be brought in any such county." §508.010.

A. UNDER §508.010, BNSF RESIDES IN ST. LOUIS COUNTY, NOT THE CITY OF ST. LOUIS AS ARGUED BY RELATORS.

For purposes of determining venue under §508.010, the residency requirement of a corporate defendant is governed by §351.375(2). This section states, in pertinent part: "The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained." §351.375(2).

A corporation does not have a residence unless such a residence is provided by statute. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 349 (Mo. banc 1962). The residence of a corporation is only an issue if a corporation is sued together with an individual defendant. In this event, residency must be established. §508.010.

The residence of a corporation, with the notable exception of insurance companies, is determined pursuant to §351.375(2). This statute provides, for all purposes, a corporation is a resident of the county in which it maintains its registered agent for service of process. §351.375. The "for all purposes" language includes determination of venue under §508.010(2). State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991). The distinction upon which Relators hang their hat is an "alleged" difference in law applicable to foreign as opposed to domestic corporations. In this argument, Relators argue that if an individual is sued with a domestic corporation, the corporation resides only where its registered agent is

located for venue purposes, but if an individual is sued with a foreign corporation, a foreign corporation resides in any location where venue is proper under §508.040.

It is clear that a domestic corporation resides solely in the county where its registered agent resides. In State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951) this Court held that §351.375 limited corporate venue to the county where its registered agent was located for determining residence for purposes of §508.010(2). Several years after O'Keefe was decided, this Court, in State ex rel. Whiteman v. James, 265 S.W.2d 298 (Mo. banc 1954), ruled that venue was improper in Jackson County where the individual defendant resided in Andrew County and a foreign corporate defendant, although having an office in Jackson County, had their registered agent in the city of St. Louis. Whiteman cited O'Keefe as authority, stating that the "only difference between that case and this is that there the corporation was a domestic corporation and service upon it was undertaken under another statute. These circumstances are without significance, and so do not justify any other or different construction of the statutes." Id. at 300. In conformity with O'Keefe, this Court held that proper venue, in terms of the foreign corporate defendant's residence, was the county in which the corporation's agent was registered. Id.

Relators pay great deference to the decision in State ex rel. Stamm v. Mayfield, 340 S.W.2d 631 (Mo. banc 1960), and argues that Stamm overruled

Whiteman insofar as it applied §351.375 to foreign corporations. Relators' reliance on the Stamm decision is misplaced by virtue of this Court's decision in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962). In Bowden this Court held that a foreign corporation resides where its registered agent is located, distinguishing the prior holding in Stamm on multiple levels.

One distinction recognized by this Court between Bowden and Stamm is that Stamm is applicable to foreign insurance companies, which are treated differently, statutorily, than foreign corporations. Another ground upon which Bowden distinguished Stamm in terms of its holding that §351.375 is applicable to foreign corporations was by noting that Stamm stated that the "all purposes language" in regards to foreign corporations was "mere obiter." Both State ex rel. Stamm v. Mayfield and State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998), are relied on by Relators in claiming that foreign corporations should be considered to "reside" wherever they transact business. To Relators' misfortune both of these cases involve foreign insurance companies, not foreign corporations. Section 351.690(2) makes it clear that, except for specific exceptions, insurance companies are not subject to the corporate venue statute §508.040. This Court has clearly held that business corporation laws, regardless of whether the corporation is domestic or foreign, do not apply to foreign insurance corporations when determining venue

under §508.010(2). State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991).

Relators also argue that this Court should adopt Judge Wolff's suggestion in State ex rel. Smith v. Gray, 979 S.W.2d 190, 194 (Mo. banc 1998), that a corporation should be held to reside under §508.010 in every county where venue is proper under §508.040 for venue purposes. Id. Of course, Judge Wolff's suggestion would subject individual defendants such as Mr. Drapp to suit in multiple additional venues and drastically change existing law. Nonetheless, it was certainly worthy of consideration by the General Assembly and no doubt was, as is his suggestion that "the St. Louis city-county venue maneuvers be, which have accounted for much of our case law on this subject, ended by merging the jury pools in the city and county."[6] Linthicum, 57 S.W.3d at 860. In Linthicum, Judge Wolff noted that the distinction between city of St. Louis jurors and St. Louis County jurors has a tendency to skew the jury composition of those separate jurisdictions to be unrepresentative of the community at large. Id. However, unless these suggestions raise constitutional issues to be addressed by the Court, these suggestions to change existing law are in fact the province of the General Assembly, not the Court.

[6] It can be presumed that the General Assembly considered Judge Wolff's suggestions and rejected them. See Sec. I (B) above.

BNSF is not an insurance company but is a foreign corporation with its registered agent in St. Louis County and the cases Relators rely on are readily distinguishable and do not control the facts of the case at hand. The definitions set forth in §351.015 apply to the entire chapter, including foreign corporations, "unless the context otherwise requires." §351.015. Section 351.582 specifically states that a foreign corporation authorized to do business in Missouri has the same but not greater rights and privileges as a domestic corporation, and that foreign corporations are "subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." §351.582. Such language indicates that the residence of an authorized foreign corporation such as BNSF is the same as that of a similar domestic corporation. Such an intent to include foreign corporations is additionally apparent in light of the "any corporation" language used in §351.375(2), stating, "[t]he location or residence of *any corporation* shall be deemed for all purposes to be in the county where its registered office is maintained." §351.375(2).[7]

[7] If one followed Relators' argument, a foreign corporation would not be required to comply with the requirement to maintain a registered agent in the state for service of process.

Although not cited by Relators, §351.690(4) extends the provisions of Chapter 351 of the Missouri statutes to almost all defendants, including foreign railroad corporations such as co-defendant BNSF. Thus, the residency statute of §351.375 applies to BNSF via §351.690(4). Chapter 351 was clearly intended to give foreign business corporations a specific, definite, and certain residence, and when construed with §508.010, provides for the proper protection of the venue rights of individual defendants who may be joined with corporate defendants. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 350 (Mo. banc 1962).

B. AS A FOREIGN RAILROAD CORPORATION, BNSF WOULD NONETHELESS BE ENTITLED TO THE SAME BENEFITS AFFORDED TO A DOMESTIC CORPORATION EVEN IF THERE WAS ANY MERIT TO RELATORS' ARGUMENT THAT FOREIGN CORPORATIONS SHOULD BE TREATED DISPARATELY FROM DOMESTIC CORPORATIONS.

Although Relators' argument that domestic corporations must be treated differently for venue purposes than foreign corporations is without merit, as a railroad corporation, BNSF would be entitled to the same benefits as a domestic corporation under Missouri law. §388.290. Section 388.290 provides that upon the consolidation of two or more railroads, the consolidated railroad is "entitled to all the

powers, rights, privileges, and immunities" of any of the railroads prior to the consolidation. *See also* MO. CONST. art. XI §10. [8]

The St. Louis-San Francisco Railroad Company was incorporated in Missouri in 1916 and in 1980 it merged with Burlington Northern Railroad Company, a foreign corporation. (Appendix A-1, Mo. Sec. of State.) Burlington Northern Railroad Company subsequently merged with the Atchison, Topeka and Santa Fe Railway Company and was renamed The Burlington Northern and Santa Fe Railway Company. (Appendix A-2, A-3, Mo. Sec. of State.) Under these circumstances BNSF is afforded the same status as a domestic corporation under Missouri law.

[8] "If any railroad corporation organized under the laws of this state shall consolidate by sale or otherwise, with any railroad corporation organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place." Mo. Const. Art. XI § 10.

III. STATE EX REL. LINTHICUM V. CALVIN IS CONSISTENT WITH PUBLIC POLICY AND LEGISLATIVE INTENT AND SHOULD NOT BE OVERTURNED.

Should Relators fail to convince the Court to overturn half a century of prior precedent, Relators' fall-back position in Point III implores the Court to reconsider and overturn State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), so they can accomplish indirectly what they cannot achieve directly. In Linthicum, this Court decisively struck down the two step joinder process used by Realtors here in hopes of retaining this case in the city of St. Louis, when venue would not be proper here if Mr. Drapp and BNSF had been jointly sued initially.

To remain true to the legislative intent underlying the Missouri venue statutes, venue must be determined whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. As stated by this Court in Linthicum at 858, "[t]his interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010 (3)." Id.

While Relators correctly state the general rule from State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994), and like cases, that venue is determined at the time the suit is "brought", Relators applied the rule to the wrong

petition. Suit was instituted or "brought" against Mr. Drapp and BNSF upon the filing of Plaintiff's Amended Petition. By filing an Amended Petition, Relators abandoned their original Petition. State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 342 (Mo. banc. 1988); Weir v. Brune, 256 S.W.2d 810, 811 (Mo. banc. 1953). The state of the law regarding this matter could not be clearer. State ex rel. Linthicum v. Calvin, supra.; Bailey v. Innovative Mgmt. & Inv. Inc., 890 S.W.2d 648, 650-51 (Mo. banc 1995).

Neither DePaul nor any of the other cases cited by Relators have held that the filing of an amended petition abolishes the venue rights of all subsequently added individual defendants, and rightfully so. The policy underlying DePaul clearly provides that plaintiffs are not to be permitted to create venue where it would not otherwise be proper. Relators however attempt to manipulate the language used by the court in DePaul to achieve exactly that which the DePaul court sought to prevent. The argument that venue should be determined when a case is "first brought" ignores the policy supporting the venue statutes.

The policy reasons for limiting venue as to individual defendants do not disappear merely because an individual is joined in a lawsuit by an amended petition filed hours or days after the original petition was filed against a corporate defendant, as opposed to being sued in the original petition as a sole defendant. Public policy requires that schemes to eliminate individual venue rights by omitting a party from

an original petition and then joining them by an amended petition be prohibited. It is neither convenient nor logical to subject an individual to venue in each and every one of Missouri's counties. The General Assembly has, as a matter of public policy, determined that individuals should not be subject to being hauled across the state for venue purposes in an unlimited number of counties where that individual neither resides nor where the cause of action arose.

Section 508.010 provides Missouri residents with specific statutory rights governing the location where he or she may be subjected to suit in Missouri. A defendant cannot be deprived of venue rights prior to suit being instituted against him or her, which is what Relators attempted to do by joining Mr. Drapp as a defendant along with BNSF less than a week after suing BNSF alone pursuant to Missouri's liberal procedural rule regarding joinder of additional parties. Relators' attempt to extinguish individual venue rights prior to the time that the suit was instituted against Mr. Drapp deprives him of his substantive right to be sued in one of those venues mandated by §508.010. Due process of law forbids that any person under the guise of a rule of procedure shall be deprived of established rights. Hayes v. C.C. & H. Min. & Mill. Co., 126 S.W. 1051, 1054 (Mo. 1910). Due process guarantees that an individual receives whatever process is constitutionally mandated or permitted under the laws in effect at the time. Richardson v. State Highway Transportation Commission, 863 S.W.2d 876, 879 (Mo. banc 1993).

Applying traditional rules of statutory construction, this Court has consistently and uniformly interpreted the interplay between §508.010 and §508.040 to harmonize the two statutes together and give meaning to the intent of both to afford individuals the right to be sued only in certain specific locations as set forth in §508.010. First recognizing those rights in 1926 in State ex el. Columbia National Bank v. Davis, 284 S.W. 464, 470 (Mo. 1926), this Court has consistently held that the venue rights of individual defendants prevail over the ability of plaintiffs to select the most potentially lucrative venue in which to file suit when the suit is instituted against both an individual and a corporation by application of the general venue statute, §508.010. State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo. banc 1998); State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996).

What Relators do not want to acknowledge is that the holding in Linthicum was necessary to maintain the protection of individuals and prevent forum shopping. Linthicum closed a loophole that has been manufactured and exploited by plaintiffs using the exact strategy attempted by Relators in this case. For this reason, Linthicum is essential to the Missouri venue structure. Overturning Linthicum would subject individuals to suit all over the state without protection under §508.010 and would deprive them of due process of the law. Linthicum is true to legislative intent. Its holding harmonizes the rule of statutory interpretation and legislative intent. To

overrule Linthicum would be to rewrite the entire structure and foundation of the Missouri venue statutes.

Linthicum is consistent with public policy and legislative intent and should not be overturned.

A. STATE EX REL. LINTHICUM V. CALVIN HAS NOT CREATED "CHAOS" NOR HAS IT CREATED MORE PROBLEMS THAN IT HAS SOLVED NOR DOES IT PREVENT A SUIT AGAINST A CORPORATION WITHOUT ITS ACQUIESCENCE.

Relators argue that Linthicum has created "chaos". Additionally, Relators argue that Linthicum be overruled because it "precludes suit against a corporation in venues provided for without its acquiescence". These and other exaggerations include:

EXAGGERATION

If Respondent, Judge Neill's Order is upheld, BNSF could never be sued in the venues provided for by §508.040 without its acquiescence. Relators' Brief p. 27.

FACT

Pursuant to RSMo. §508.040, venue is proper when the corporation is sued alone, or with other corporations in any venue where it operates its line of railroad which includes fifty (50) counties, and the city of St. Louis.

FACT

Even when joined with an individual defendant, making RSMo. §508.010 applicable, BNSF and Mr. Drapp are subject to suit in Phelps County (where the cause of action accrued), Franklin County (where Mr. Drapp resides), and St. Louis County (where BNSF resides for venue purposes).

EXAGGERATION

Foreign corporations can restrict venue by creating a mail drop, known as a registered office, or remove to federal court. Relators' Brief p. 27.

FACT

Maintaining a registered office and agent as required by Missouri law does not restrict venue in any manner under RSMo. §508.040. However, maintaining such an office provides a fixed, designated additional location for venue when a corporation is sued with an individual pursuant to RSMo. §508.010.

FACT

A foreign corporation cannot remove a case to federal court once a non-diverse defendant is joined as a defendant, as was done in this case.

FACT

It is not the corporation's registered office or agent that limits venue pursuant to RSMo. §508.010, but instead is the initiation of suit against an individual which, in deference to individuals, limits venue to those locations specified in the statute.

EXAGGERATION

With Linthicum there is the possibility of venue transfer at any point in the litigation. Relators' Brief p. 65.

FACT

If litigation is initiated in a venue which is proper under RSMo. §508.010, venue will not change if subsequent defendants are added.

What Relators fail to acknowledge is that proper and improper venues exist for every cause of action. Only causes of actions subject to improper venue are transferable. State ex rel. Vaughn v. Koehr, 835 S.W.2d 543, 544 (Mo.App.E.D. 1992). Likewise, transfer of venue can only be made to a proper venue, thereby preventing further transferability due to venue challenges when additional parties are joined in the lawsuit.

In State ex rel. Mellenbrunch v. Mummert, 821 S.W.2d 108, 109 (Mo.App.E.D. 1991) the court held, "Section 476.410 authorizes a circuit judge to transfer a case to another circuit in which it could have been brought but only if venue is improper in the circuit court in which the case was filed." A transfer of venue when the cause of action is filed in a proper venue is in excess of a judge's jurisdiction. Id. If the case is filed in a proper venue, transferring the case to another venue would be void. Hefner v. Dausmann, 996 S.W.2d 660, 663 (Mo.App.S.D. 1999).

As it is clear that §508.010 applies to the case *sub judice,* there are limited jurisdictions in which a plaintiff can establish venue. §508.010. A plaintiff seeking to file suit against both a corporate and an individual defendant may file suit against both defendants in either (1) the county in which the cause of action occurred, or (2) any county where any defendant resides. §508.010(2),(6). As applied to this case, there are three available forums that would give rise to proper venue under §508.010.

First, venue would be proper in Phelps County, Missouri. Phelps County is where the accident involved in this proceeding occurred. Section 508.010 (6) of the Missouri venue law states, "In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties…." §508.010(6); *See also* State ex rel. England v. Koehr, 849 S.W.2d 168, 169

(Mo.App.E.D. 1993). If Relators initially filed suit in Phelps County, the case would not be transferable to another county even if Relators subsequently joined other individual defendants. The second venue in which Relators could have properly filed this suit, would have been in Franklin County, Missouri. Mr. Drapp resides in Franklin County, and under the plain language of §508.010, it is evident that such location would be a proper venue and thereby non-transferable. See §508.010 (2), which authorizes venue where "any defendant resides." The third venue in which this cause of action can be litigated is in St. Louis County, where BNSF maintains its registered agent or office.

In light of the above, it is evident that had Relators initially filed this suit in any one of three proper venues, their concerns and the inaccurate argument regarding never-ending transfers of venue would be non-existent. Now that this case has been transferred to St. Louis County, the suit will not be subject to further transfer as St. Louis County is an appropriate venue under §508.010(2). Subsequent parties may expand venue possibilities, but not make a properly venued case subject to transfer unless Relators attempt, as here, to impermissibly manipulate venue.

Additionally, when a corporation is sued together with an individual defendant, a corporation still has almost no control over the venue for the litigation. The corporation does not control the residence of the individual defendant and

likewise does not control the county in which the plaintiff's cause of action accrued. The defendant corporation is however permitted by statute to select the county of its registered agent for service of process as its residence for purposes of §508.010. To that degree, it is true that a corporation may determine in advance at least one possible location in which it may be sued in the future. However, such a small concession in the wake of the burdens that Relators seek to impose on individual defendants can hardly be characterized as an ability to avoid venue without the corporation's acquiescence.

The problem here is not a lack of appropriate venues for suit against BNSF, it is the undeserved benefit Relators seek to obtain. Relators desire having a claim that is not removable to federal court on the basis of diversity jurisdiction, while simultaneously retaining the benefit to keep this case in state court in the city of St. Louis and subject William A. Drapp to suit there where it would not be proper if Mr. Drapp was joined initially with BNSF.

The initial omission of Mr. Drapp from the Original Petition was obviously not an oversight as without his presence, Relators' case would be removed to federal court, and it is obviously not the city of St. Louis *per se* where Relators desire to be, but in <u>state court</u> in the city of St. Louis. Determined to keep this case in state court in the city of St. Louis, Relators added William A. Drapp as a defendant less than one

week after the initial petition was filed. If, of course, service is made of the initial petition prior to the filing of an amended petition, the sole diverse defendant could exercise its right to remove the case to federal court. However, by filing the amended petition prior to service of the initial petition, Relators prevent removal, and do indirectly what they cannot do directly. Such forum shopping and circumventing of the Missouri venue statutes by Relators should not be allowed.

It is obvious by the timing of the filing of the original petition and Relators' Amended Petition, that the failure to include Mr. Drapp as a defendant in the original Petition was not an unintentional oversight. He was added to prevent removal of the case to federal court. **Thus, the necessity for the change in venue in this case is created solely by Relators' subsequent joinder of Mr. Drapp which they intended to join all along. Relators can hardly complain of changes in venue created solely by their own attempts to improperly create venue.**

Linthicum has not "created more problems than it solved." When suit is filed in an appropriate venue, the cause will no longer be subject to transfer. This is not a never-ending, unpredictable rule. If Relators had filed suit in any three of the proper venues as provided in §508.010(2) and §508.010(6), venue would not be subject to transfer even if later defendants were added. **The sole cause of**

Relators' "inconvenience" and the transfer of venue in this case was their own conscious decision to initially file this cause of action in a venue that was not proper under §508.010 when an individual is joined with a corporation as a defendant.

Furthermore, if Relators do not want to disturb venue set by the filing of the original petition, Relators do not have to file an amended petition. Given the multiple choices for venue established by §508.040 and §508.010, Relators can hardly complain about a lack of venue choices, nor can Relators demonstrate any prejudice by affording each defendant the venue rights mandated under Missouri law.

Linthicum is not only the prevailing law and thus should not be overturned unless there is a compelling reason to do so; it is also good law. In Linthicum the plaintiff employed the same scheme attempted by Relators in the case *sub judice.* Linthicum rejected the arguments made by Relators, declaring that venue must be reconsidered at the time the suit was "brought" by amended petition. Even Judge Stith's partial concurrence and partial dissent recognizes that the Court could have reached the same result by limiting the re-determination of venue in light of amended petitions to cases in which amended pleadings have been filed before service of the

original petition or before the filing of the original defendant's answer, which was done in this case. Linthicum at 865.[9] Permitting plaintiffs to avoid the application of RSMo. §508.010 by filing multiple pleadings to delay joinder to deprive them of their venue rights under §508.010, allows plaintiffs to blatantly circumvent Missouri's venue laws.

IV. RELATORS CANNOT DISTINGUISH THE FACTS IN THIS CASE WITH THE FACTS IN STATE EX REL. DEPAUL HEALTH CENTER V. MUMMERT OR STATE EX REL. LINTHICUM V. CALVIN AND THE DISMISSAL OF WILLIAM A. DRAPP DOES NOT INVALIDATE RESPONDENT'S ORDER.

Relators also argue in Point IV that since it dismissed Mr. Drapp in an effort to avoid the application of §508.010 following Linthicum, Respondent misinterpreted both Linthicum and State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1994).

Relators argue that since BNSF was the sole defendant when suit was first brought, it cannot complain of improper venue when a plaintiff abandons the initial

[9] Judge Stith notes that this simple approach would resolve most of the writs filed in the Supreme Court of Missouri that raise the issue of "pretensive non-joinder," including this case.

suit and then brings suit via amended petition against an individual along with a corporation. **In order to travel down this road, Relators ignore the holding in Linthicum that when an individual is joined in a suit with a corporation by amended petition, §508.010 is applicable to the exclusion of §508.040.** To suggest otherwise would: (1) deprive individuals such as Mr. Drapp of their venue rights before they were ever sued; (2) encourage the practice of filing multiple petitions within hours or days of each other to again accomplish indirectly what could not be done directly, and (3) create a dichotomy between those cases in which plaintiffs left individual defendants in the case and those in which plaintiffs dismissed individual defendants. This is hardly a policy that the Court should condone.

However, aside from the policy issues, there is no practical distinction between the dismissal of one of the parties in DePaul, and the dismissal of Mr. Drapp, as venue is determined at the time the case was "brought" and it is "brought" as to Mr. Drapp and BNSF via amended petition.

When an amended petition has been filed, the original petition is abandoned and it may not be considered for any purpose. Evans v. Eno, 903 S.W.2d 258, 260 (Mo.App.W.D. 1995). As noted by the Court in Leis v. Massachusetts Bonding &

Ins. Co., 125 S.W.2d 906, 908 (Mo. App. 1939):

> It is well settled that when a plaintiff files an amended petition the original petition is abandoned and becomes a mere "scrap of paper" insofar as the case is concerned.

By filing an amended petition, plaintiff has abandoned his original petition and cannot rely on the original petition for any purpose. Weir v. Brune, 256 S.W.2d 810, 811 (Mo. 1953); Welch v. Continental Placement Inc., 627 S.W.2d 319, 321-322 (Mo. App. 1982). However, in a desperate effort to distinguish this case from DePaul, Relators argue that ". . . in DePaul, this Court clearly found the case to have been 'brought' when it was originally filed and *ignored the amended pleading* by which the non-corporate defendant was dismissed." Relators' Brief p. 68. **Relators inaccurately depict the facts in DePaul. Plaintiff did not file an "amended pleading" dismissing the individual defendant in DePaul. Plaintiff filed a Stipulation of Dismissal in DePaul just as Plaintiff filed a Stipulation of Dismissal in this case.**

The dismissal of a party, without prejudice, does not result in the abandonment of the prior petition, and in the context of a negligence claim in which acts of negligence are alleged against the employee, as in this case, those allegations remain in the case as imputed to the employer under the doctrine of respondent superior.

In Linthicum this Court held that suit is "brought" for venue purposes, whether by original petition or by amended petition. Thus, Linthicum is consistent with DePaul, and Relators' attempt to avoid transfer by dismissing Mr. Drapp must likewise fail.

Secondly, Relators incorrectly argue that BNSF "had an opportunity to challenge venue based upon the original petition in which it was sued . . . [but] it did not do so . . . ." Relators' Brief p. 87. **In fact, BNSF did not have any "opportunity to challenge venue" because Relators hurriedly filed an amended petition before service of the original petition.** What Relators seek to do is rely upon a petition that was abandoned before it was ever served. As noted previously, once a petition is abandoned by filing an amended petition, it is nothing more than a "scrap of paper". In contrast, the only petition that exists in the case is the petition brought against both Mr. Drapp and BNSF, the amended petition.

Adopting Relators' position will simply result in plaintiffs' not only filing multiple petitions within hours or days, (which in itself is a vast waste of judicial resources) in an effort to avoid application of §508.010 and strip individuals of their venue rights, plaintiffs will then wait to see if the individual defendant files a motion to transfer. If a motion to transfer is filed, plaintiffs will then dismiss the individual and argue that the amended petition is meaningless and create an

exception to the rule announced in DePaul. This is hardly a practice which the Court should encourage.

Relators also attempt to seek support in this Court's recent decision in State ex rel. SSM Healthcare St. Louis v. Neill, 73 S.W.3d 140 (Mo. banc 2002) suggesting that it "rejected the reasoning behind O'Keefe, Bowden v. Jenson, and the other cases that recite the mantra that when an individual is joined with a corporation, §508.010 governs."[10] Relators' Brief p. 46. Exactly where that conclusion comes from is unknown however, as this Court clearly distinguished the differences in §508.040 and §355.176.4 in which the latter mandates that venue as to non-profit corporations **shall be commended only** in specified locations.

> As is evident, the two sections differ in that section 508.040 states that suit "shall" be commenced in a certain location, whereas section 355.176.4 states that suit "shall be commenced *only*" in certain locations. Id at. 144.

Relators' strained efforts to distinguish the facts in this case or find support for their position in any binding authoritative precedent fail. Over half a century of prior precedent and this Court's decision in DePaul and Linthicum control the

[10] Relators obviously use the phrase "recite the mantra" in lieu of "follow the rule of *stare decisis*."

outcome in this case. Respondent's Order transferring this case to St. Louis County was proper under existing law.

V. A DETERMINATION THAT FOREIGN CORPORATIONS RESIDE WHERE THEY MAINTAIN THEIR REGISTERED AGENT AND IN ANY COUNTY WHERE THEY HAVE OFFICES OR AGENTS FOR THE TRANSACTION OF BUSINESS WILL SUBSTANTIALLY INCREASE THE NUMBER OF LAWSUITS FILED IN THE CITY OF ST. LOUIS OR OTHER PREFERRED PLAINTIFFS' VENUES, TO THE DETRIMENT OF INDIVIDUALS, OTHER DISTRICT COURTS, OTHER COUNTIES, AND TO THE DETRIMENT OF RESIDENTS OF THE CITY OF ST. LOUIS.

A decision holding that, under §508.010, foreign corporations "reside" in any county where they maintain their registered agent and in any county where they have offices or agents for the transaction of business or a decision which overrules O'Keefe and holds that individuals are subject to suit in any venue where a corporation is subject to suit and will nullify the limits placed on venue by the General Assembly when individuals are sued. This radical change of Missouri precedent will abolish virtually all venue rights of individuals, which are rightfully

protected under §508.010, and will cause an increase in cases filed in the city of St. Louis or other preferred plaintiffs' venues.

The Missouri Judicial Report Supplement for the fiscal year of 2001 show that 6,488 general civil cases were filed in the city of St. Louis.[11] **Even "[I]f the jury system and number of cases stay about the same in the city of St. Louis, and the population continues to decrease, the right to trial by jury will be at risk." Linthicum, Id. at 861.[12] Currently, the citizens of the city of St. Louis who are called for jury duty carry a "tremendously disproportionate burden" as compared to citizens of St. Louis County. Linthicum, Id.** Going down the road to open the floodgates as Relators advocate will further exacerbate this trend.

In Judge Wolff's partial concurrence and partial dissent in Linthicum at 858, he noted that in 1999 - 2000, thirty percent (30%) of the city's adult population over the age of 21 were summoned for jury duty in the city of St. Louis, while only two percent (2%) of St. Louis County's adult population over the age of 21 were summoned. Id. at 861. Judge Wolff has also noted that a resident of the city of St. Louis qualified for jury service is guaranteed to be called to jury duty at least once

[11] In contrast, only 373 similar cases were filed in Franklin County, Missouri, and a mere 298 similar cases were filed in Phelps County, Missouri, Missouri Judicial Report Supplement, 2001.

every two years. This makes for the "recycling and reusing of jurors which is warning of the prospect that people will become more resistant to jury service." Donna Walter, *Juries a Hot Topic at Annual Bench & Bar Conference*, ST. LOUIS DAILY RECORD, June 12, 2002, at 1, 48. **As noted by Judge Wolff in Linthicum, "[f]rom the data recited here, it is quite clear that jury service may be disproportionately costly for some of our citizens who reside in the city of St. Louis.** Id. at 862. This burden will only increase if the St. Louis population base continues to decline as projected by the state or if a new wave of lawsuits are permitted to be filed there. See Linthicum, Id. fn 12 at 861. Such negative effects on individual defendants, as well as the residents of preferred venues must be considered by this Court as a matter of public policy.

Conversely, if this Court opens the floodgates to permit a new wave of lawsuits to be filed in the city of St. Louis, courts in other counties will not receive their share of lawsuits and will be left with a sparse caseload. **Allowing plaintiffs to file an ever-increasing number of cases in the city of St. Louis will strip other courts of the opportunity to adjudicate many cases and preclude local juries from deciding issues that may have a significant impact on their community or their residents.** The filing of litigation in the county where the

---

[12] Judge Wolff concurring in part and dissenting in part.

cause of action occurred or where an individual resides involves not only the local residents as parties in the cases and involves issues of concern to the local community, it also has an economic impact on the community. Permitting cases such as this case to be filed in the city of St. Louis will have a negative impact on courts and other counties, particularly rural counties throughout the state. These, and other policy considerations dictate that Missouri's venue law not be changed as advocated by Relators.

CONCLUSION

Respondent's Order transferring this case to St. Louis County is proper. It has repeatedly and consistently been held that §508.010 is applicable when an individual is joined with a corporate defendant. Never has this Court held that §508.040 shall apply in such circumstances. The current state of the law and *stare decisis* irrefutably lead to the conclusion that BNSF "resides" in St. Louis County, the county where BNSF maintains its registered agent pursuant to §508.010. Linthicum properly recognized the intent of the General Assembly to limit venue when individuals are joined in a suit with a corporation, and upheld the integrity of the two-tiered Missouri venue provisions. Linthicum also properly rejected the very same scheme employed by Relators to create venue where it would not exist had Relators joined William A. Drapp in the Original Petition.

The Writ of Mandamus should be quashed and Respondent's Order transferring venue to St. Louis County should be affirmed.

Respectfully submitted,

BRASHER LAW FIRM, L.C.

_____

William A. Brasher, Esq. #30155
John H. Marshall, Esq. #24422
One Metropolitan Square
211 N. Broadway, Suite 2300
St. Louis, MO 63101
(314) 621-7700
FAX: (314) 621-1088

APPENDIX

CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This brief includes the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, and fax number;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief contains 14,085 words according to the word-processing systems used to prepare the brief; and

4. This brief contains 1,436 lines of type according to the line count of the word-processing system used to prepare the brief.

5. Microsoft Word was used to prepare Respondent's brief.

6. The diskette provided with this brief has been scanned for viruses and is virus free.

_____

William A. Brasher #30155

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed via U.S. Mail, first-class, postage prepaid, on this 19th day of August, 2002, to:

David L. Steelman, Esq.
Steelman & Gaunt
901 Pine Street, Suite 110
Rolla, MO 65402

Dale Haralson, Esq.
Haralson, Miller, Pitt, et al.
1 South Church, Suite 900
Tucson, AZ 85701-1620

Hon. Margaret M. Neill
St. Louis City Circuit Court
10 N. Tucker Blvd., Division 1
St. Louis, MO 63101

Hon. Barbara W. Wallace
St. Louis County Circuit Court
7900 Carondelet Avenue
Clayton, MO 63105

BY: _____